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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court[1] is reported at 244 F. Supp. 955. The report of the Interstate Commerce Commission[2] is printed at 322 I.C.C. 301.

JURISDICTION

This was a proceeding under 28 U.S.C. 1336, 2284, 2321–2325, to set aside orders of the Interstate Com-

[1] Printed as Appendix A to the Jurisdictional Statement in *American Trucking Assns.* v. *Atchison, Topeka and Santa Fe Ry.*, No. 908, this term.

[2] Reproduced as Appendix C to the Jurisdictional Statement in *American Trucking Assns., supra.*

merce Commission promulgating certain rules. The final judgment of the three-judge district court[3] was entered on August 20, 1965. The notice of appeal was filed on October 18, 1965, by the United States and the Interstate Commerce Commission. This Court has jurisdiction under 28 U.S.C. 1253 and 2101 (b) to review the judgment of the district court on direct appeal. *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTION PRESENTED

Whether the Interstate Commerce Commission has authority to promulgate rules providing (1) that railroads which offer piggyback[4] service on an open-tariff basis[5] must make that service available on the same terms to motor carriers, and (2) that, subject to certain restrictions, motor carriers may utilize rail open-tariff piggyback service in the performance of all or any portion of their authorized service.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to pro-

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[3] Appendix A, *supra*, pp. 55–56.

[4] Also known as "TOFC" (trailer-on-flatcar).

[5] *I.e.*, to the regular shipping public, including freight forwarders.

mote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49, U.S.C. 2, provides:

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar

> circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 12(1) of the Act, 24 Stat. 383, as amended, 49 U.S.C. 12(1), provides in part:

> * * * The Commission is hereby authorized and required to execute and enforce the provisions of this part * * *.

STATEMENT[6]

On June 29, 1962, the Interstate Commerce Commission, on its own motion, commenced its "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service." *Ex Parte No. 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 303. Under existing practice, piggyback shipments move under either "joint intermodal" plans wherein the rail and motor carrier join in offering a single rate for the piggyback movement, "open tariff" plans, which the railroads offer to conventional shippers and freight forwarders but rarely to motor carriers, or "all rail" plans in which the railroad, using its own trucks, offers a complete door-to-door service (see 322 I.C.C. at 304–305, 309–312, 319). Against this background, the Commission considered, among other things, the extent to which motor carriers should be permitted to participate in open-tariff rail rates and services offered by the railroads for piggyback move-

[6] We limit this statement to the portions of the Commission's proceeding that are at issue in this appeal.

ments, and concluded that there was a need for greater coordination between rail and motor carriers in the performance of piggyback service and that appropriate rules should be promulgated to achieve this end (322 I.C.C. at 327–337). Rule 2 (322 I.C.C. at 336–337, 49 C.F.R. 500.2), adopted by the Commission on March 16, 1964, provides that "TOFC [piggyback] service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The core of Rule 3 (322 I.C.C. at 337, 49 C.F.R. 500.3) is a provision that motor carriers "may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier."

Appellees (railroad companies and freight forwarders) brought this action in a three-judge district court to challenge these rules. The district court concluded that Rules 2 and 3 exceeded the Commission's authority, and set them aside, thereby upholding the absolute right of a rail carrier to refuse to carry a trailer offered to it by a motor carrier under the rail carrier's general tariff, available to the public at large, governing carriage by piggyback (244 F. Supp. 955). It held, first, that there was no affirmative statutory basis for the rules. The court deemed Section 2 of the Interstate Commerce Act, on which the Commission had relied, inapplicable on the ground that

the section was limited to discrimination in rates. Section 3(1), which expressly forbids some service discriminations, the court also deemed inapplicable, on the ground that discrimination between carriers was exempted. The court further held that the rules contravened express provisions of the Act, including those related to freight forwarders and a provision (Section 216(c), 49 U.S.C. 316(c)) that authorizes motor carriers to enter into joint rates and through routes with rail carriers but does not empower the Commission to compel such arrangements.

THE QUESTION IS SUBSTANTIAL

This case involves the legality of rules issued by the Interstate Commerce Commission to govern fundamental aspects of piggyback service—the movement of truck trailers on railroad flatcars. The decision below, holding the rules invalid, curtails the Commission's regulatory authority radically, and we submit erroneously, in an area of basic importance to the future of the transportation industry. Plenary consideration is accordingly warranted.

1. Since the early 1950's, piggyback—theretofore an insignificant method of transportation—has grown explosively, and its rapid growth continues unabated today.[7] The reason for the dynamic growth and enormous potential of piggyback is that it success-

[7] The railroads' piggyback revenues now exceed $300 million annually (ICC Bur. of Econ., *Transport Economics*, November 1965, p. 1); this may well be only the beginning. In 1955, the 32 railroads that reported offering piggyback had a total of 168,150 piggyback car loadings (322 I.C.C. at 309); in 1965, 63 railroads reported, and their total was 1,031,000 (Assn. of Am. R.R., Car Service Div., Cir. CS-54A, January 1, 1966).

fully combines the most efficient features of rail and motor transportation. Railroad transportation is highly economical for the movement of freight over long hauls,[8] but most shippers and consignees are not located directly on a railroad track, and their goods must be picked up from, and delivered to, the railheads. For this, trucks, with their speed and flexibility for pick-up and delivery, are necessary. To combine truck transportation for the short haul with rail transportation for the long haul, however, normally requires first unloading the truck at one railhead and there re-loading the goods into a railroad car, and then unloading at the destination railhead and re-loading onto a truck. Piggyback eliminates these costly rehandling operations.

At present piggyback, though a union of rail and motor transport, is dominated by the railroads. Since the motor carrier can itself provide only the truck portion of the service, it cannot offer a complete piggyback service without the railroad's cooperation. The railroad, in contrast, by operating its own trucks directly or through a trucking subsidiary or by leasing them back to the shipper, can offer a complete piggyback service without calling on a motor carrier; or it can enter into arrangements for through routes with such motor carriers as it wishes. As a direct result of the railroads' strategic position in piggyback, a minimum of 42 percent of all piggyback shipments now move under plans in which the rail-

[8] It has been found that the cost of transporting a truck trailer by railroad flatcar is only ⅓ that of transporting the trailer over the highway. See Meyer, Peck, Stenason, and Zwick, *The Economics of Competition in the Transportation Industries* (1959), pp. 150–151.

roads perform (or provide indirectly) the *entire* service, door to door, using their own trucks.[9] Motor carriers participate in only about 28 percent[10]—and then only on the railroads' terms.

The Commission conducted this comprehensive rulemaking proceeding to explore the propriety of permitting the railroads to have such unrestricted control over the participation of franchised motor carriers in piggyback operations. It concluded (see *e.g.*, 322 I.C.C. at 329–330) that the railroads' conduct was incompatible with the National Transportation Policy (49 U.S.C., preceding Section 1) which Congress has directed the Commission to follow in administering the Interstate Commerce Act. That directive is "to provide for fair and impartial regulation of all modes of transportation," "to recognize and preserve the inherent advantages of each [mode]," to "promote * * * adequate, economical, and efficient service," and to "encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices"—all "to the end of developing, coordinating, and preserving a[n adequate] national transportation system by water, highway, and rail." As the Commission found, the existing piggyback situation is antithetical to the congressional goal of a genuinely coordinated national transportation system. It is

[9] See ICC Bur. of Econ., *Transport Economics*, November 1965, p. 1. Of course, there is *some* railroad participation in 100% of piggyback movements.

[10] *Transport Economics*, *supra*, p. 1.

contrary to the National Transportation Policy in several respects.

First, unrestricted railroad control over motor carrier participation in piggyback service is inconsistent with "economical and efficient service" because it retards maximum utilization of rail carriage for the long haul. A long-haul motor carrier excluded by the railroads from participation in piggyback is forced—unless he is willing to abandon long-haul shipping altogether—to use his trucks for the long-haul as well as short-haul portions of all his movements, even those where piggyback would be a more efficient method (see pp. 6–7 and n. 8, *supra*). And using trucks to move shipments over distances for which rail transportation is far more efficient and economical involves a significant misallocation of transportation resources.

Second, railroad domination of piggyback is anti-competitive.[11] Motor carriers, if afforded access to rail flatcars for the line-haul movement of their trailers, could compete effectively with railroads offering their own door-to-door piggyback service. The railroads' refusal to offer their open-tariff plans to motor carriers prevents such competition, particularly with respect to the trucking segment of the piggyback service. The motor carrier who is not permitted to participate in piggyback, and must therefore use trucks for the entire shipment, is at a marked competitive disadvantage vis-à-vis a railroad that offers

[11] Preserving competition and preventing monopoly are, of course, goals implicit in the National Transportation Policy. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 86–87.

a complete door-to-door piggyback service. As a result, even though motor carriers are plainly no less able efficiently to perform the trucking services required in piggyback movements than railroads that have their own trucks, the railroads are in a position to monopolize the entire service—its truck as well as its rail portions.[12]

Third, railroad domination of piggyback is a fertile source of discrimination among motor carriers. Those who, being favored by the railroads, are permitted to participate in piggyback movements have a distinct competitive edge—unrelated to superior efficiency—over other motor carriers. Such favoritism is not conducive to fair and constructive competitive practices in the motor carrier industry, and the promotion of alliances between railroads and a few favored carriers must in the long run weaken competition between railroads and motor carriers generally.

Finally, it is contrary to "fair and impartial regulation of all modes of transportation" for railroads to be permitted to offer a complete door-to-door piggyback service, using trucks, while motor carriers may

[12] As in the classic tying arrangement (see, *e.g.*, *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1), the leverage which flows from the railroad's complete control of the vital rail segment of the piggyback movement enables it to extend its monopoly power from one market (the rail segment of the piggyback movement) to another market (truck transportation to and from railroads in piggyback movements) and thereby destroy competition in the second market from equally efficient carriers—the independent motor carriers.

not offer the same service, using the rails. Piggyback joins the inherent advantages of both modes and should therefore be available to either.

The basic thrust of the Commission's rules here in issue is to require the railroads to transport truck trailers tendered by motor carriers on the same terms and rates that they transport trailers tendered by shippers. If upheld, the rules would open up competition for piggyback traffic to all motor carriers by enabling them to utilize the railroad's flatcar service at the same rates as other shippers and would thereby prevent railroads from either dealing with certain favored motor carriers to the exclusion of others or refusing to participate in an integrated rail-motor service altogether. The rules would also foster the maximum efficient utilization of rail transportation for long hauls—for no longer would a motor carrier be compelled to move by highway shipments which, because of the distance involved, could be moved more economically by rail.[13]

2. There can be, we think, little doubt of the economic wisdom and desirability of the Commission's rules, their responsiveness to a perceived evil, their importance to the nation's transportation goals, and their conformity with the policies that Congress has

[13] At the same time, the rules protect the legitimate economic interests of the railroads in the rail portions of piggyback service. The rules do not require the railroad to accord motor carriers any special or favored treatment; it is free to charge them as much as it charges shippers. Therefore, since its rates are required to be compensatory, it cannot suffer by being required to carry the motor carriers' truck trailers at shippers' rates.

directed the Commission to follow in administering the Interstate Commerce Act. The more serious question is whether, as we believe, the Commission has authority to promulgate such rules.

If specific and express statutory basis be required for directing the railroads to offer their open-tariff piggyback rates to motor carriers as well as conventional shippers, it may be found in Section 2 of the Act, 49 U.S.C. 2, which provides that it shall be unlawful for any carrier, by any special rate or other device, to demand greater compensation from any person than it demands from any other person for performing a like service in substantially similar circumstances. This provision, in our opinion, would clearly forbid a railroad to charge a motor carrier more for carrying his truck trailer than it charged a conventional shipper for the same shipment. Whoever tenders the trailer—shipper or motor carrier—the service performed by the railroad is not only substantially similar but completely identical. Cf. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144, 166. And since the statute protects all persons, not merely shippers, the railroad cannot look to the person of the sender and charge a higher rate because he happens to be a competing carrier. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 225 U.S. 326, 342; see, also, *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740; *Kansas City S. Ry.* v. *United States*, 282 U.S. 760; cf. *Interstate Commerce Commission* v. *Delaware, L. & W.R.R.*, 220 U.S. 235.

Admittedly, to sustain the Commission's rules under Section 2, a further step must be taken: the section must be read to embrace not only a refusal to render like service to all at the same price, but a refusal to render service to some at any price. Since the practical economic effects of a flat refusal to serve and of a prohibitively high rate are the same, a ban against the greater discrimination is, we think, implicit in the express prohibition of the lesser discrimination. See *Smith* v. *Northern Pac. R. Co.*, 1 I.C.C. 208, 212. The section is aimed broadly at unjust discrimination, and the discrimination here is especially harmful. Moreover, if it were not forbidden by Section 2, a gaping hole would be opened in the Act. For the only other section addressed to discrimination, Section 3(1), 49 U.S.C. 3(1), has been held to be limited to discrimination between competitors [14]—as Section 2 is not (*National Spring & Wire Co.* v. *Director General*, 60 I.C.C. 564, 566). At all events, if there are doubts as to the scope of Section

[14] See, *e.g.*, *Osborne McMillan Elevator Co.* v. *Minneapolis, St. P. & S.S. M.R. Co.*, 306 I.C.C. 155; *Stanislaus County* v. *Atchison, T. & S.F. Ry.*, 302 I.C.C. 365; *United States* v. *Great Northern Ry.*, 301 I.C.C. 21, 26–27. There is accordingly no occasion to consider the scope of the proviso to Section 3(1) (which has no counterpart in Section 2) to the effect that the section "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." It seems likely, however, that the proviso was included solely to prevent a railroad from being able to complain that it was unlawfully prejudiced or disadvantaged by reason of lower rates charged by a competing mode of transportation. 79 Cong. Rec. 5656 (remarks of Senator Wheeler). Thus, it appears to have little relevance to the problem of this case.

2 here, they should be resolved in the Commission's favor, since its construction so clearly fulfills the National Transportation Policy. Cf. *Interstate Commerce Commission* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 762; *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83.

We need not rest with Section 2. This Court has already held, in a closely related context, that the Commission can require railroads to interchange their cars with water carriers so as to enable the latter to offer a type of integrated service analogous to piggyback, even though "[t]here is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines." *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616. The Court held the "absence of specific language" not determinative, pointing out that the "very complexities of the subject" had led Congress to leave the details of administrative regulation to be spelled out by the Commission "in the light of the Congressional purpose to foster an efficient and fair national transportation system," and that the interchange requirement imposed by the Commission was required to carry out the National Transportation Policy (*id.* at 616–617).[15]

[15] In *American Trucking Assns.* v. *United States*, 344 U.S. 298, the Court again upheld rules whose purpose was "to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system" (344 U.S. at 310), albeit the practices were not specifically forbidden in any provision of the Act. The Court held that the Commission was authorized to impose requirements not specified in the Act, where necessary to correct evils endangering the scheme of regulation. *Id.* at 310–312. See, also, *Assigned Car Cases*, 274 U.S. 564.

As we have seen, the railroads' domination of piggyback has consequences—such as inefficient use of transportation resources, unfair exclusion of motor carriers from competition with railroads in providing piggyback service, and promotion of discrimination among motor carriers [16]—of the kind that the National Transportation Policy directs the Commission to prevent. Moreover, it is an axiom of common carrier regulation that such a carrier has a duty to serve all on equal terms,[17] and this duty is breached where a railroad, in order to insulate itself from the competition of motor carriers, claims the right unilaterally to decide which, if any, such carrier, and on what terms, shall be permitted to transport its trailers on the railroad's flatcars.

Thus, in promulgating rules on the basis of "clear and adequate evidence of evils attendant on" the railroads' piggyback practices, the Commission here was attempting, not to "expand its power arbitrarily" (*American Trucking Assns.* v. *United States,* 344 U.S. 298, 310), but to correct "conditions which may directly frustrate the success of the regulation under-

[16] In the *Pennsylvania R. Co.* case, *supra*, the Court expressly noted that the railroads' picking and choosing among water carriers to determine who among them should enjoy the competitive benefits of being able to offer an integrated rail-water service was contrary to the National Transportation Policy and a basis for the Commission's exercise of its enforcement authority (323 U.S. at 617).

[17] This underlies not only Sections 2 and 3(1) of the Act, but also Section 1(4), which states that it is the duty of the railroads "to provide and furnish transportation upon reasonable request therefor."

taken by Congress" (*id.* at 311). The Commission's rules should therefore be sustained.

3. The opinion of the district court reflects an unduly restrictive view of the scheme of the Interstate Commerce Act and of the Commission's function. This is apparent in the court's expressed concern with certain "anomalies" that it feared the Commission's rules would produce. These dangers are unreal.[18]

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[18] A few examples must suffice:

(a) In finding that the logic of the Commission's rules would "permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier," thereby creating an impasse, the court overlooked the fact that a carrier who did this—or who attempted to "shunt its unprofitable traffic onto a competing railroad"—would, if its conduct was unreasonable, violate its duty of carriage under Section 1(4) of the Act (see n. 17, *supra*). Further, since the rates of carriers subject to the Interstate Commerce Act are by law compensatory, no motive would ordinarily be present for refusing business unless it could be handled more economically by another carrier or mode.

(b) The court's fear that a motor carrier, by using Plan II (door-to-door piggyback service offered by a railroad), could "abandon any pretense of performing services as a carrier," is also groundless, since a motor carrier which refused to provide "continuous and adequate service" would violate Section 204 (a)(4) of the Act, 49 U.S.C. 304(a)(1), and its certificate could be revoked for dormancy (49 U.S.C. 312(a)).

(c) The court thought that giving the motor carrier a choice between Plan III (open tariff) and Plan I (through route and joint rate with the railroad) would create an unjust discrimination in violation of Section 2, assuming that section were applicable. Plan I, however, simply contemplates the joint offer by motor carrier and railroad of a single rate applicable to both the motor and rail segments of the piggyback movement. The motor carrier, under Plan I, is not buying a service from the railroad but selling a service in partnership with the railroad; it pays the railroad a rate only

Moreover, possible problems that may arise in the implementation of rules that have not been permitted to become effective are no ground for invalidating the rules on their face—especially since the Commission expressly stated that its rules were not the "final and definitive word" but, rather, were subject to modification as experience might require (322 I.C.C. at 325).

The district court also went astray in insisting upon finding an exact statutory predicate for the Commission's rules—just the kind of "section-by-section search" rejected by this Court in *American Trucking Assns.* v. *United States,* 344 U.S. 298, 309 (see p. 14, n. 15, *supra*)—and in emphasizing prior decisions of the Commission which to some extent are inconsistent with the present rules. The Commission has an ongoing responsibility to re-examine its precedents in the light of changed conditions in the transportation industry; such re-examination was properly conducted here in a comprehensive rule-making proceeding in which the Commission, for the first time, was able to view the piggyback problem whole upon a complete record.[19] Further, the court's view that the four parts of the Interstate Commerce

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under Plan III. There is no unjust discrimination in the railroad's receipt of different compensation under two so different plans. See further, pp. 19–20, *infra.*

[19] This Court, and distinguished commentators, have urged administrative agencies to formulate policy as much as possible in comprehensive rule-making proceedings, as here, rather than through piecemeal litigation. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; Friendly, *A Look at the Federal Administrative Agencies*, 60 Col. L. Rev. 429, 437 (1960).

Act establish a principle of rigid separation among the various modes of transportation and deprive the Commission of all power to require coordinated transportation except where expressly authorized by a specific statutory provision is wholly opposed to the National Transportation Policy laid down by Congress as the authoritative guide to interpreting and applying the Act.

Nor is there merit to the court's view that the Commission's rules are in conflict with certain provisions of the Act, such as the freight-forwarder provisions (Part IV). A carrier does not, as the court thought, become a freight forwarder merely because, like a forwarder, it utilizes the services of another carrier. Section 402(a)(5) of the Act, 49 U.S.C. 1002(a)(5), expressly excludes from the statutory definition of a forwarder one who, "as a carrier," "utilizes for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." To be sure, a motor carrier would cease to operate as a carrier if it utilized piggyback to ship goods between points not specified in its certificate, but this the Commission's rules expressly forbid (see 322 I.C.C. at 362–364). In addition, a motor carrier that used Plan II (door-to-door service by the railroad) otherwise than as an incident to or in conjunction with the performance of a certificated service would expose itself to severe sanctions (see p. 16, n. 18, *supra*).

Neither do the Commission's rules violate Section 216(c) of the Act, 49 U.S.C. 316(c), which permits

rail and motor carriers to join in through routes but does not authorize the Commission to require them to do so. The court below read the provision as embodying a congressional decision to withhold from the Commission the authority to promulgate rules like those in suit. However, the term "through route" is applicable only to an arrangement whereby the motor and rail carriers "hold themselves out as offering" a joint service. *Thompson* v. *United States,* 343 U.S. 549, 557. An open-tariff regulation—the only arrangement reached by the challenged rules—merely entitles a motor carrier to use the railroad's lines on the same terms as shippers, and involves no holding out of a joint service.

It is not as if Section 216(c) expressed a congressional determination—in flat contradiction to the National Transportation Policy—to deny the Commission power to require any manner of coordination of rail and motor services. That section (enacted in 1935, long before piggyback emerged as a significant mode of transportation) was intended to enlarge the scope of voluntary coordination between different modes, not preclude the Commission from correcting abuses stemming from refusals to cooperate. While Congress rejected a proposal to empower the Commission to compel motor carriers to enter into through routes with rail carriers, it did so for a reason peculiar to through routes and inapplicable to piggyback—the fear expressed by some motor carriers that they would be weakened if forced into such arrangements with powerful railroads. 79 Cong. Rec. 5655 (remarks of Senator Wheeler). The Commission's rules, in

fundamental contrast to compulsory through-route requirements, do not compel any motor carrier to join in an offer of service with a railroad (or *vice versa*), and they do not regulate the terms upon which the motor carrier may ship on the railroad's flatcars or prescribe divisions of revenue from a piggyback movement in which both a motor and rail carrier participate; they merely permit the motor carrier to ship under certain tariffs.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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